STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

NORMAN L. BECK, Complainant, and AFSCME/IOWA COUNCIL 61 and LOCAL #2995, Respondents.	)	CASE NO. 4297

PROPOSED DECISION AND ORDER

Statement of the Case

On September 27, 1990, Norman L. Beck (Beck) filed a prohibited practice complaint (PPC) with the Public Employment Relations Board (PERB or Board) alleging that representatives of AFSCME/Iowa Council 61 (AFSCME or Council 61 or Union) and Local #2995, had violated Iowa Code §20.10(3)(a)(1991).[1] Beck alleged that Council 61 and Local #2995 discriminated against him on the basis of his non-union status, a status which is protected by statute.[2] Beck further alleged that Council 61 and Local #2995 failed in their duty to represent him by their refusal to file a grievance on his behalf. The Union's failure to file the grievance, he alleged, denied him the opportunity to proceed at the first step of the grievance process in an attempt to settle an

[1]This and all subsequent statutory citations, unless otherwise indicated, are to the Iowa Code (1991).

[2]Iowa Code §20.8(4)(1991). Public employees shall have the right to: . . .

4. Refuse to join or participate in the activities of employee organizations, including the payment of any dues, fees or assessments or service fees of any type.

alleged contract violation with his employer, Mount Pleasant Correctional Facility (MPCF).

On October 18, 1990, AFSCME filed a "Motion to Dismiss a Complaint" based on: (1) a general denial of the petition's allegations and (2) the argument that neither AFSCME's business agent, Dan Varner, nor the Local #2995 president, Darrell Gray, could be sued individually. Beck resisted the motion. On December 13, 1991, AFSCME filed a "Motion to Join the State as `Co-Defendant'." Beck resisted the motion. On January 14, 1992, oral arguments on the above-named motions were heard at PERB offices. Both motions were denied in their entirety.

On May 4, 1992, a hearing was held at the MPCF. AFSCME, Council 61 and Local #2995 were represented by Michael Hansen and complainant, Norman Beck, appeared *pro se*. All parties had full opportunity to present testimony and evidence at hearing. I took official notice of all documents contained in PERB's official case file and afforded the parties the opportunity to review the case file, pursuant to Iowa Code §17A.14(4)(1991).[3]

AFSCME renewed its Motions to Dismiss and to Join the State as `Co-Defendant' and both motions were again denied. Based on the entire record in this case, I make the following Findings of Fact and Conclusions of Law.

---

[3]§17A.14(4) Official notice may be taken of all facts . . . within the specialized knowledge of the agency. Parties shall be notified at the earliest practicable time, either before or during the hearing, . . . of the facts proposed to be noticed and their source, including any staff memorandum or data. . . .

FINDINGS OF FACT

According to the "Employee Organization Annual Report" filed with PERB, Local #2995 is the certified employee organization and AFSCME/Iowa Council 61 is the parent organization, which represents the correctional officers at the MPCF.

Beck is a correctional officer (CO) at the facility and is a non-union member. Sometime prior to May 12, 1987, Beck filed a grievance based on an alleged inability to work in a smoking environment. AFSCME processed the grievance and Dan Varner, Council 61 business representative, represented Beck at the third step hearing, and signed the settlement agreement on May 12, 1987, which states in its entirety:

> "As a resolution to the above grievance, the grievant, Mr. Norman Beck, will be assigned to Tower 1, five days a week, with his existing schedule. The grievance is resolved and hereby closed".

The settlement agreement also includes the legible signatures of (1) Norman Beck, (2) Charles Higgins (the Security Director), (3) Garth Ganka (Local #2995 union steward), and (4) Janice Creighton (an administrative assistant).

Since the time of that settlement agreement, Beck has performed CO duties at the regular pay rate in Tower 1. Pursuant to Tower duties, Beck receives a designated amount of overtime (OT) pay on a daily basis.[4] Beck's Tower duty is non-rotating. All COs at MPCF who work regular duties, (i.e. are not on special light-duty or special assignments because of medical disability) work on

---

[4]Beck receives OT approximately five to ten minutes per day, which allows him to get to and from the Tower duty station.

a rotating shift. It was undisputed that the rotating shift system is disliked by the CO staff.

After the 1987 settlement agreement, Beck refused to work in smoking areas and worked only in Tower 1, when he was being paid at the regular pay rate. However, he accepted work in smoking areas when such work was being paid at OT rate. In other words, he required the employer to adhere to the terms of the settlement agreement and insisted that he work in "smoke-free" environments as long as no OT was being offered. If OT was involved, he freely worked in smoking areas and did not complain to MPCF that such a work assignment might be in violation of the settlement agreement.

The incident which precipitated the events which lead to Beck's filing of the instant complaint was a staff meeting held sometime in April of 1990. At that meeting, with Superintendent Scurr and several lieutenants as well as many COs in attendance, Beck publicly complained about [then] Lieutenant Fickert who had "allowed" smoking in a training session which Beck had attended. Lieutenant Fickert publicly apologized to Beck and indicated that he would no longer allow smoking at any training session.

Immediately following the meeting, Local #2995 president, Darrell Gray, began to receive complaints about Beck. The "gist" of the complaints was that the COs who were on the rotation system objected to Beck being allowed to work OT in smoking areas when he refused to work regular duty in smoking areas. Local #2995 received in excess of one dozen complaints regarding this issue. COs also complained to the employer. After receiving the

complaints, Gray asked Superintendent Scurr if the employer would review with the Union the terms of Beck's settlement agreement. Shortly thereafter, Beck was no longer afforded an opportunity to work OT in smoking areas.[5]

Once Beck was denied OT in smoking areas, he requested that Local #2995 Vice-President, Leola Kelly, file a grievance on his behalf. She advised Beck that she was not authorized to file grievances and further advised that he must go either to a designated union steward or to Varner in order to file the grievance. Beck then talked with a union steward, Ron Russell, and requested that his grievance be filed. Russell requested advice from Local President Gray and was advised that the grievance was "bad", that what Beck requested was contrary to the terms of the collective bargaining agreement,[6] and contrary to the terms of the 1987 settlement agreement. Russell did not file the grievance.

At the next scheduled meeting of the Local #2995 Executive Board (E Board), Beck's grievance was discussed. Gray recommended

---

[5]Evidence is lacking on whether the union requested MPCF to adhere to the terms of Beck's settlement agreement or whether MPCF acted upon its own initiative in refusing Beck the opportunity to work OT at jobs other than Tower duty (his normal work unit assignment). It is undisputed that almost immediately following the staff meeting, Beck no longer was offered OT in any area where smoking was allowed.

[6]Union Ex. #1 - Article 8, Section 2C of the collective bargaining agreement

Scheduling of Over Time -

> The employer will, as far as practicable, distribute overtime on an equal basis by seniority among those included employees <u>in that classification assigned to the work unit who normally performed the work involved</u>. (emphasis added).

that the grievance not be filed. After the discussion, the E Board unanimously voted to refuse to file Beck's grievance. Council 61 policy, however, provides for an alternate procedure whereby the grievant has the option of requesting that the grievance be filed by a Council 61 business representative.[7] This policy of allowing for an alternate process was relayed to all AFSCME locals a number of years ago through a memorandum issued by Council 61. The purpose of the memo was to advise the locals that the local stewards did not have an obligation to process an employee's grievance, but the steward (or local officer) did have an obligation to advise the grievant of the alternate process so that a grievance could be filed on his/her behalf.

Testimony established that, unless an employee makes his/her membership status known, Varner does not know of union membership or non-union membership prior to the processing of a grievance on behalf of an individual employee. Several instances were related in which grievances have proceeded through the arbitration stage of the grievance process on behalf of non-union members.

---

[7]While there was substantial testimony regarding a request made to Dan Varner from AFSCME/Council 61 President, Don McKee, to file Beck's grievance, subsequent to the filing of Beck's complaint, there is no evidence in the record that Beck ever requested that Varner file a grievance in 1989 or 1990; that Varner had seen the minutes of the E Board at which they had voted to refuse Beck's grievance; or that Varner refused a request by Beck to file a grievance on Beck's behalf, prior to September 27, 1990. These actions of the union, taken subsequent to the filing of this complaint, are not dispositive of whether the union actions taken prior to its filing were violations of the union's duty to fairly represent Beck.

Darrell Gray, Local #2995 president since 1977, testified that; (1) since 1977 approximately 500 grievances have been filed at the local level, for both non-union members and union members, (2) in approximately 1978, there was a document which was posted on the union bulletin board which referred to non-union members as Scabs,[8] (3) Gray distributed pins (referred to at hearing as "buttons") which state that "non-union employees are free loaders".[9] Gray personally believes that a freeloader is an employee who is not a union member, however, neither Local #2995 nor Council 61 has a policy of refusing to handle a grievance on the basis of non-union membership. One witness testified that he had been advised by Gray and a Local #2995 steward (in fall of 1991) that "unless he were a Union member, his grievance would die at the first step." Testimony also confirmed that Gray regularly passes out a list of those employees who are union members and non-union employees, at the Union meetings.

CONCLUSIONS OF LAW

The issue raised is whether AFSCME/Council 61 and Local #2995 violated Sections 10.3(a) and 17.1 of the Public Employment Relations Act (Act), when they initially refused to file Beck's

---

[8]There was no testimony introduced which indicated who authorized the document to be posted, how long it was posted, or for what purpose it was posted.

[9]Testimony established that the pins are sent to union and non-union members to encourage membership, however it was not established how many pins are in distribution, or whether the pins were distributed prior to the filing of Beck's complaint.

grievance at the first step, thereby allegedly failing in their duty to fairly represent him.

The petition alleges that AFSCME's failure to file Beck's grievance was for the purpose of harassing or coercing him into becoming a union member, which is a violation of his §20.8(4) rights.[10] Beck requested that PERB issue a cease and desist order as a remedy for the alleged violation.

AFSCME maintains that; (1) Beck's grievance was investigated and found to be meritless, (2) Local #2995 advised Beck it would not process the grievance on his behalf, (3) the alternate process was for Beck to request that Dan Varner file the grievance and (4) there is no evidence in the record to sustain a claim that AFSCME/Council 61 and Local #2995 failed in their duty to fairly represent Beck. AFSCME argues that, in order to sustain such a claim, Beck must first prove that the grievance had merit (i.e. was a violation of the collective bargaining agreement) and then must prove that the Union discriminated against Beck based on his non-union status.

Section 10.3(a) of the Act states, in relevant part, that it is a prohibited practice for a labor organization to willfully:

> Interfere with, restrain, coerce or harass any public employee with respect to any of the employee's rights under this chapter or in order to prevent or discourage the employee's exercise of any such right, including, without limitation, all rights under section 20.8.

---

[10]See supra at FN #2.

Iowa Code §20.17(1) states, in relevant part:

> . . . The employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly. . . . To sustain a claim that a certified employee organization has committed a prohibited practice by breaching its duty of fair representation, a public employee must establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith. (emphasis added).

The duty of fair representation is a well developed doctrine under the federal law, and has been dealt with in several cases under the Iowa Act.[11] The Board has previously held that a certified labor organization's failure to fairly represent all bargaining unit members constitutes a prohibited practice under §10.3(a) of the Act.[12] In Donna Trachta v. AFSCME, the Board cited with approval the following:

> . . . To allow individual employees to overrule and supersede their union would work havoc on the union themselves and seriously disturb the field of labor relations. . . . a disappointed employee carries a strong burden of proof that the union acted in bad faith, fraudulently and arbitrarily.[13]

In discussing the Union's duty to exercise its discretion in good faith, commentator Martin H. Malin has stated:

---

[11]Donna Trachta v. AFSCME, 90 PERB 3673 & 3674; Kenneth Ross v. AFSCME & Iowa, 85 PERB 2562; Donald Funk v. Teamsters Local 421 & Dubuque Community School Dist., 84 H.O. 2719 & 2724; William Talbert v. AFSCME, Local 1868, 83 H.O. 2224.

[12]Elaine Brown, 84 PERB 1755 (Decision on Remand).

[13]Donna Trachta, 90 PERB 3673 & 3674 (Citing Perry & Council Bluffs Educ. Assn., 76 H.O. 671 & 672; McGrail v. Detroit Fed'n of Teachers, 474 F.2d 696, 82 LRRM 2623 (1973)).

> There appears to be a consensus among the circuits that a DFR [duty of fair representation] breach requires greater culpability than mere negligence.[14]

When discussing the Union's duty to fairly represent an employee in the context of processing grievances, he analyzed several cases from the 8th Circuit which found the following:

> ". . .[W]here unions have considered past practice, grievance awards, or clear contract language in deciding which employees to support, courts have found their actions to be reasonable and not DFR breaches.[15]
>
> Thus, a union does not breach its duty of fair representation where it makes a good faith, non-arbitrary determination that a grievance is of dubious merit and then trades it for other grievances or benefits."[16]

In Stevens v. Teamsters, Local 600,[17] the 8th Circuit rejected a DFR claim that was based on the Union's mishandling of a grievance. The court found rational explanations for the Union's conduct and concluded: "By the word `perfunctory' we understand the cases to mean conduct that is no more than going through the motions involving no real effort to put forward a position. . . .[18] Mere negligence, poor judgement, or ineptitude on the part of the

---

[14]Malin, Martin H., Individual Rights Within the Union, at 357-371 (BNA 1988)

[15]See e.g. McKinney v. Machinists Dist. 1450, 624 F.2d 745, 104 LRRM 3013 (6th Cir. 1980); Fox v. Mitchell Transport Inc., 506 F.Supp. 1346, 112 LRRM 2261 (D. Md.), aff'd mem., 671 F.2d 498, 113 LRRM 2951 (4th Cir. 1981).

[16]See Buchholtz v. Swift & Co., 609 F.2d 317, 101 LRRM 2229 (8th Cir. 1979), cert. denied, 444 U.S. 1018, 103 LRRM 2143 (1980).

[17]See e.g. Stevens v. Teamsters, Local 600, 794 F.2d 376, 122 LRRM 3040 (8th Cir. 1986); further citations omitted.

[18]Id. at 376, 122 LRRM at 3042.

Union is insufficient to establish a breach of the duty of fair representation."[19]

In Vaca v. Sipes,[20] the United States Supreme Court established the standard of conduct for an employee organization, stating:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.[21]

This standard has been adopted by the Iowa Legislature in Iowa Code §20.17(1), and has been interpreted in PERB caselaw.[22]

Examining the Union's conduct against the Vaca standard, I find no evidence of arbitrary, discriminatory, or bad faith actions on the part of the Union. The Union based its position, that Beck's grievance should not proceed through the grievance process, upon the results of its investigation showing that a prior settlement agreement had been reached between Beck and the employer which required Beck to work in non-smoking areas. The Union clearly considered the merits of the grievance (which was aimed at allowing Beck to be assigned OT in areas other than the Tower in which he 'normally' worked) in light of that 1987 settlement agreement. That settlement agreement, the Union reasonably decided, controlled and restricted the areas to which Beck could be

---

[19]Id. (Citing, Curtis v. United Transportation Union,700 F.2d 457,458, 112 LRRM 2864 (8th Cir. 1983)).

[20]386 U.S. 171 (1967).

[21]Id. at 190.

[22]See supra at FN #11.

assigned OT. It was not unreasonable or arbitrary for the Union to consider the wisdom and ramifications of proceeding with a grievance which clearly was at odds with the prior, negotiated, settlement agreement and which the Union believed was clearly at odds with the previously negotiated Article 8 §2C of the collective bargaining agreement.[23]

After investigating and reading this 1987 settlement agreement, and after a comparison of the settlement agreement with the terms of the collective bargaining agreement, Article 8 §2C, which required that overtime be performed by those employees who "normally perform" the work within that area, the Union determined that a processing of Beck's grievance would elicit subsequent grievances on behalf of other employees within the bargaining unit. The Union represents all members of the bargaining unit and has the duty to determine, initially, whether a grievance of an individual employee represents a violation, by the employer, of the collective bargaining agreement, or of a prior agreement between the employer and the Union. In the instant case, Local #2995 did exactly that.

After Gray's initial investigation, he elicited a recommendation by the AFSCME representative, Varner, who also opined that a processing of Beck's grievance would elicit further grievances by other bargaining unit members. After Gray's investigation and conversation with Varner, Beck's grievance and its underlying merits were discussed at the Local #2995 Executive Board meeting where it was unanimously determined that the

---

[23]See supra at FN #6.

grievance should not be filed at the local level. Beck was advised that, should he wish to proceed, he need contact Varner. There is no evidence in the record which indicates that Beck ever contacted Varner or that Varner, either directly or indirectly, advised Beck that his grievance would not be filed at the Council 61 level. When reviewing the evidence in the record, I find that AFSCME's decision not to proceed with Beck's grievance was not arrived at in a perfunctory manner.

Nothing in the record indicates that the Union's failure to proceed with Beck's grievance was based upon a discriminatory or an arbitrary reason. The Union, through its Local #2995 vice-president and president, in addition to the local steward, advised Beck that Local #2995 would not proceed on his behalf in processing the grievance. The record clearly indicates that Beck was advised, should he wish to proceed, that he need contact Dan Varner. Nothing in the record indicates that the Union provided less representation to Beck, in terms of quality, than that which it provided to other employees, nor is there sufficient record evidence which indicates that a grievance of a non-union employee is treated differently than the grievance of a union member employee.

While testimony indicated that both the Local #2995 president and vice-president believe strongly in the benefits of the Union, there is nothing in the record to support the theory that these personal feelings had any significant impact on the investigation

and subsequent decision of Local #2995 to refuse to file Beck's grievance.

Therefore, I do not believe that Complainant, Norman Beck, has met the burden of proof of showing that AFSCME/Council 61 and Local #2995 have committed a prohibited practice within the meaning of §§20.3(a) and 17.1 of the Act. Based upon the foregoing I enter the following recommended Order.

ORDER

IT IS HEREBY ORDERED that the complaint in this matter be, and the same hereby is, dismissed.

DATED at Des Moines, Iowa this 2nd day of July, 1992.

Diane Tvrdik,
Administrative Law Judge

cc: Michael Hansen
Norman Beck